

United States
Circuit Court of Appeals

For the Ninth Circuit. 5

EDGAR D. ROSENBERG, HELEN ROSENBERG KAHN, and CLAUDE N. ROSENBERG,

Appellants,

vs.

JOHN P. McLAUGHLIN, Collector of Internal Revenue for the First District of California, Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

FILED

JUL 5 - 1932

PAUL P. O'BRIEN,
CLERK

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BERG KAHN, and CLAUDE N. ROSEN-
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD.

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Attorneys for Appellee.

In the United States District Court for the North-
ern District of California, Southern Division.

No. 2998-S.

EDGAR D. ROSENBERG, HELEN ROSEN-
BERG KAHN and CLAUDE N. ROSEN-
BERG,

Plaintiffs,

vs.

JOHN P. McLAUGHLIN, Collector of Internal
Revenue of the United States for the First
District of the State of California,
Defendant.

BILL IN EQUITY FOR INJUNCTION.

Now come the plaintiffs above named and for
cause of action against the above-named defend-
ant allege:

I.

Each and all of the plaintiffs above named are citizens of the United States and of the State of California and reside in the City and County of San Francisco, State of California.

II.

The defendant, John P. McLaughlin, is now, and during all the times hereinafter mentioned was, Collector of Internal Revenue of the United States of America for the First District of California, duly qualified and acting as such.

III.

The matter or amount in controversy herein exceeds, exclusive of interest and costs, the value or sum of three thousand dollars.

IV.

On May 31, 1923, Isidore Rosenberg died testate and a [1*] resident of the City and County of San Francisco aforesaid, leaving him surviving his widow Natalie Rosenberg and three children, Edgar D. Rosenberg, Helen Rosenberg Kahn and Claude N. Rosenberg, the plaintiffs herein. Thereafter, and on June 20, 1923, the last will and testament of said decedent was duly admitted to probate and said Natalie Rosenberg appointed executrix thereof by order of the Superior Court of the State of California, in and for the City and County of San Francisco, and thereupon she qualified and entered upon her duties as such executrix.

*Page-number appearing at the foot of page of original certified Transcript of Record.

Among other provisions, said last will and testament of said Isidore Rosenberg, deceased, gave, devised and bequeathed his entire estate to his said widow and children in the proportions set opposite their respective names, as follows:

Natalie Rosenberg, widow.....	one-half
Helen Rosenberg Kahn, daughter.....	one-sixth
Edgar D. Rosenberg, son.....	one-sixth
Claude N. Rosenberg, son.....	one-sixth

V.

On December 21, 1923, and within one year after the death of said decedent, Natalie Rosenberg, as said executrix, pursuant to the provisions of Title IV of the Revenue Act of 1921 and in good faith, made and filed with defendant, as such Collector of Internal Revenue, a return under oath in duplicate setting forth the value of the gross estate of decedent at the time of his death, the deductions allowable under section 403 of said Revenue Act of 1921, the value of the net estate of said decedent as defined in said section 403 and the estate tax payable thereon as computed by her in the amount of \$7,791.04. At the time of filing said return for estate tax and prior to the due date of said tax, said executrix fully paid the amount of the estate tax shown upon said return by paying to defendant, as such Collector, said amount of [2] \$7,791.04.

VI.

Thereafter, on March 24, 1924, and prior to the distribution of the estate of said decedent as hereinafter alleged, said Natalie Rosenberg, as such ex-

executrix, filed with defendant, as such Collector, and with the Commissioner of Internal Revenue her claim as such executrix for refund in the amount of \$5,181.90 of the estate tax paid by her as aforesaid on the ground that the same had been illegally collected by defendant, as such Collector.

VII.

On May 17, 1924, and prior to any action by said Commissioner on the refund claim filed as hereinabove in paragraph VI alleged, said executrix rendered and filed with the Superior Court of the State of California, in and for the City and County of San Francisco, her first and final account and report of her administration of the estate of said decedent, together with her petition for the settlement of said account and the distribution of said estate.

VIII.

On July 10, 1924, said first and final account of said executrix and her petition for final distribution of said estate came on for hearing before the said Superior Court and thereupon said court made and entered its decree settling said first and final account of said executrix and ordering the distribution of said estate to the beneficiaries hereinabove in paragraph IV named and in the proportions set opposite their respective names in said paragraph.

IX.

By and under said decree of distribution the entire estate of said decedent was distributed to the

above-named heirs and beneficiaries under the will of said decedent in the aforesaid proportions. Among the properties distributed in said decree, [3] there was distributed an undivided three-eighths interest in and to all that certain lot, piece or parcel of land situate, lying and being in the City and County of San Francisco aforesaid and bounded and particularly described as follows, to wit:

Beginning at a point on the westerly line of Powell Street distant thereon ninety-one (91) feet and three (3) inches northerly from the point formed by the intersection of the westerly line of Powell Street with the northerly line of Post Street, and running thence northerly along said line of Powell Street forty-six (46) feet and one (1) inch thence at a right angle westerly eighty (80) feet; thence at a right angle southerly forty-six (46) feet and one (1) inch; thence at a right angle easterly (80) feet to the point of beginning. Being a part of 50 Vara Lot No. 586.

Together with the improvements thereon and subject to a bank mortgage on the entire property in the amount of \$160,000.

Under said decree of distribution and on said July 10, 1924, the undivided three-eighths interest in and to the above-described real property passed from the gross estate or any other estate of said decedent into the ownership and possession of the

heirs and legatees of said decedent in the following undivided portions:

Natalie Rosenberg, widow.....three sixteenths
 Edgar D. Rosenberg, son.....one sixteenth
 Helen Rosenberg Kahn, daughter...one sixteenth
 Claude N. Rosenberg, son.....one sixteenth

At the date of death of said Isidore Rosenberg and at the time of the distribution of his estate as aforesaid, Joseph Cahen owned an undivided one-half interest and said Edgar D. Rosenberg owned an undivided one-eighth interest in the above-described parcel of real property.

X.

At the time of the distribution of the estate of said Isidore Rosenberg, deceased, as aforesaid, all estate taxes shown upon the return filed by said executrix had been paid to defendant, [4] as such Collector, and no additional amount of tax on said estate had been determined, found to be due, assessed, or demanded by the Commissioner of Internal Revenue or by defendant, as such Collector.

XI.

On February 7, 1925, said Natalie Rosenberg died testate at the City and County of San Francisco aforesaid. Thereafter and on March 9, 1925, her last will and testament was admitted to probate by the Superior Court of the State of California, in and for the City and County of San Francisco, and Helen Rosenberg Kahn was thereupon and by order of said court appointed executrix of said last will and testament and immediately thereafter duly qualified as and became the executrix of said estate.

In and by said last will and testament, after providing for certain specific legacies, said Natalie Rosenberg, deceased, designated her three children Edgar D. Rosenberg, Helen Rosenberg Kahn and Claude N. Rosenberg, the plaintiffs herein, as residuary legatees of her estate to take the residue thereof share and share alike.

On July 10, 1925, said Edgar D. Rosenberg, Helen Rosenberg Kahn and Claude N. Rosenberg filed a petition for partial distribution of the said estate of Natalie Rosenberg with the Superior Court aforesaid and therein prayed for distribution to them share and share alike of the three-fifths interest of the said estate in the parcel of real property hereinbefore described. On July 27, 1925, said Superior Court made and entered its decree of partial distribution whereby and whereunder the interest of said estate in and to said described property was distributed to said residuary legatees in the proportions of one-sixteenth undivided interest to each.

On or about February 6, 1926, as required by the Revenue Act of 1924, said Helen Rosenberg Kahn, as such executrix, [5] made and filed a return for estate tax for said estate of Natalie Rosenberg, deceased, with said defendant, as such Collector, and at said time paid the amount of estate tax shown upon said return to defendant, as such Collector.

On June 23, 1926, by regular proceedings had, the estate of said Natalie Rosenberg, deceased, was, by order and decree of the aforesaid Superior Court, finally distributed.

XII.

After the death of said Natalie Rosenberg and on March 23, 1925, said Edgar D. Rosenberg filed with the Superior Court of the State of California, in and for the City and County of San Francisco, his petition for appointment as administrator with the will annexed of the estate of said Isidore Rosenberg, deceased, thereafter, and on April 6, 1925, said Superior Court made its order appointing said Edgar D. Rosenberg the administrator with the will annexed of said estate and on said date said Edgar D. Rosenberg qualified as such administrator and ever since has been and now is the duly qualified and acting administrator with the will annexed of the estate of said Isidore Rosenberg, deceased. Said letters of administration were obtained solely for the purpose of collecting and receiving a refund in estate tax for said estate.

XIII.

On April 22, 1925, the Commissioner of Internal Revenue, by letter addressed to "Natalie Rosenberg, Executrix, Estate of Isidore Rosenberg," advised in his action on the claim for refund filed by said executrix, as hereinbefore in paragraph VI alleged, as follows:

"Madam:

"The Bureau has examined the claim filed by you as executrix on behalf of the above-named estate for refund of \$5,181.90 paid under the Revenue Act of 1921. [6]

"The protest is based upon the inclusion in the

gross estate of the value of the widow's interest in community property.

“A final audit of the return for the estate discloses an excess payment of \$4,787.60 as follows:

“Tax paid on basis of the return.....	\$7,791.04
Tax determined on audit of return.....	3,003.44

Excess payment.....	\$4,787.60
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*	*	*	*	*	*	*	*	*	*	*
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“In view of the foregoing, your claim for refund of \$5,181.90 will be certified to the Disbursing Clerk of the Treasury Department for payment in the sum of \$4,787.60 and is rejected as to \$394.30.”

XIV.

Thereafter and on or about June 5, 1925, defendant, as such Collector, paid and refunded to said Edgar D. Rosenberg, as such administrator with the will annexed of the said estate of Isidore Rosenberg, deceased, the aforesaid amount of \$4,787.60, which said amount was thereupon and immediately distributed to plaintiffs, and, since said time, said estate has been without property or assets of any kind whatsoever.

XV.

On June 1, 1925, and prior to the determination or assessment of any additional tax against said estate of Isidore Rosenberg, deceased, plaintiffs purchased an undivided one-half interest in and to the real property hereinabove in paragraph IX described from Joseph Cahen, who had owned the said one-half interest since prior to the death of said Isidore Resenberg. On the same date plaintiffs sold

an undivided one-quarter interest in and to said real property to Irving D. Langendorff, who ever since has been and is the owner of such one-quarter interest. On said June 1, 1925, plaintiffs and said Langendorff entered into, and have ever since maintained and now maintain, an agreement of partnership for the operation of said property and the building thereon as a hotel, and have been and now are the owners and in possession of [7] said property in copartnership.

XVI.

Thereafter and on September 25, 1926 (more than three years and three months after the death of said Isidore Rosenberg and more than two years and two months after the estate of said deceased had been finally distributed), the Commissioner of Internal Revenue reaudited the estate tax return filed as hereinafter alleged in paragraph V and made a redetermination of the estate tax for said estate, as follows:

Tax redetermined	\$10,842.51
Tax paid on filing return	\$7,791.04
Tax refunded	4,787.60
	—————
Tax discharged	3,003.44
	—————
Deficiency in tax due.....	\$ 7,839.07

Of the deficiency so alleged and determined the amount of \$3,051.47 constituted an additional tax or deficiency in tax while the amount of \$4,787.60 constituted an alleged erroneous refund to said estate.

XVII.

On September 25, 1926, said Commissioner caused to be issued and mailed to Edgar D. Rosenberg, as administrator with the will annexed of the estate of Isidore Rosenberg, deceased, a notice of deficiency. On October 19, 1926, and within sixty days after the mailing of said notice of deficiency as aforesaid, said Edgar D. Rosenberg, as such administrator, filed a petition (Docket No. 20,668) with the United States Board of Tax Appeals for a redetermination of said alleged deficiency as provided in Section 308 (a) of the Revenue Act of 1926. On December 28, 1928, said petition came on for hearing before said Board and on January 16, 1929, said Board made and entered its final decision in favor of said Commissioner for said amount of \$7,839.07.

XVIII.

On February 27, 1929, said Edgar D. Rosenberg, as such [8] administrator, paid from his personal funds, defendant, as such Collector, the deficiency in tax in the amount of \$3,051.47, as hereinbefore in paragraph XVI alleged, together with interest thereon at six per centum per annum from May 31, 1923, in the amount of \$868.77, or a total sum of \$3,920.24.

XIX.

Thereafter on July 27, 1929, said Collector of Internal Revenue assessed an alleged additional estate tax or deficiency in estate tax against said estate of Isidore Rosenberg, deceased, in the amount of \$7,839.07 and placed the same on the July as-

assessment list for Miscellaneous Taxes—estate, at page 308, line 4.

On August 15, 1929, and again on March 19, 1930, defendant, as such Collector, mailed notice and demand for payment of an alleged balance of deficiency in estate tax for said estate, in the amount of \$4,787.60, with interest thereon at six per centum from May 31, 1924, to said Edgar D. Rosenberg, as administrator with the will annexed of the said estate of Isidore Rosenberg, deceased.

XX.

On said August 15, 1929, when defendant, as such Collector, mailed his first notice and demand for payment of the said alleged additional amount of estate tax, there was no existing gross or other estate of said Isidore Rosenberg, deceased, in the control or possession of said Edgar D. Rosenberg, as such administrator or otherwise, or in the possession or control of any other person as administrator or executor of said estate, from which said additional estate tax or any other tax could be paid.

XXI.

On April 30, 1930, defendant, as such Collector of Internal Revenue, issued an alleged warrant of distraint against said Edgar D. Rosenberg, as such administrator with the will annexed, [9] for Miscellaneous Taxes—estate, but has never issued any warrant of distraint against plaintiffs, or any of them.

XXII.

Thereafter and on May 12, 1930, defendant, as

such Collector, caused to be mailed to said Edgar D. Rosenberg, as such administrator with the will annexed, a notice advising him that a distraint warrant had been issued against him for failure to pay "INCOME TAX FOR THE YEAR 1929 LIST," which said notice was in the words and figures following, to wit:

TREASURY DEPARTMENT,

Internal Revenue Service,

San Francisco, Calif.

May 12th, 1930.

Estate of Isador Rosenberg,
Edgar Rosenberg Administrator,
Chancellor Hotel.

Kindly call at Room 503 Custom House, on May 14th, between the hours of 6:30 and 9:30 a. m.

You are advised that a warrant has been issued against you for having failed to pay your Income Tax for the year 1929 List, after having received previous notice to do so.

Should you desire to clear this matter up, mail a check or Post Office Money Order, payable to the Collector of Internal Revenue, for \$6,935.31 attention of the undersigned.

For your information I quote Section 253 of the Revenue Act of 1921, which reads as follows:

"That any individual, corporation or partnership required under this title to pay or collect any tax, to make a return or to supply information, who fails to pay or collect such

tax, to make such a return, or to supply such information, at the time or times required under this title shall be liable to a penalty of not more than \$1,000. Any individual, corporation, or partnership who wilfully refuses to pay or collect such tax, to make such statement or to supply such information at the time or times required under this title or who wilfully attempts in any manner to defeat or evade the tax imposed by this title, shall [10] be guilty of a misdemeanor and shall be fined, not more than \$10,000 or imprisoned for not more than one year, or both, together with the costs of prosecution.”

You will appreciate from the foregoing the necessity of prompt compliance to this FINAL 4th notice.

Respectfully,

S. A. BYRNE,
Deputy Collector.

XXIII.

On June 19, 1930, said Edgar D. Rosenberg, on behalf of himself as such administrator and as an individual and also on behalf of the plaintiffs herein, caused a letter and protest to be mailed to said Commissioner and a copy thereof to defendant, as such Collector, wherein and whereby notice was given that the estate of Isidore Rosenberg, deceased, had been distributed by order of court prior to the determination of any alleged deficiency in tax. Said letter advised said Commissioner and

defendant that said estate was without assets and protested that proceedings under section 316 of the Revenue Act of 1926, against the distributees of the estate of said Isidore Rosenberg, deceased, as transferees, had not been instituted. Said letter further advised said Commissioner and defendant that no assessment of any liability for tax incident to the estate of Isidore Rosenberg, deceased, had been made against the distributees thereof, plaintiffs herein.

XXIV.

On July 25, 1930, said Commissioner, by letter bearing that date, informed said Edgar D. Rosenberg, as such administrator, that the Collector, defendant herein, was "being instructed to proceed with the collection of the amount due from the estate," which letter was received by said Edgar D. Rosenberg on or about July 30, 1930.

On July 30, 1930, said Edgar D. Rosenberg caused another [11] letter and protest to be addressed and mailed to said Commissioner, and a copy thereof mailed to defendant, wherein he again called attention to the fact that the said estate of Isidore Rosenberg was without assets and contended that the distributees of said estate were entitled to assessment against them and that a notice of liability should be sent to each of them as transferees before the Commissioner could proceed to collect.

The Commissioner of Internal Revenue replied to said letter and protest on August 5, 1930, advising said Edgar D. Rosenberg, as such administrator, that transferee proceedings were not neces-

sary "for the continuance, validity or enforcement" of the lien which he asserted arose against said estate under the provisions of section 409 of the Revenue Act of 1921. Said letter was received by said Edgar D. Rosenberg on or about August 10, 1930.

On August 16, 1930, plaintiffs caused a reply to said letter to be mailed to the Commissioner in which the attention of the Commissioner was again called to the distribution of the estate of Isidore Rosenberg, deceased, and request was made that transferee proceedings be initiated against the distributees of said estate in order that they might assert their defenses to the alleged deficiency in tax.

On August 30, 1930, said Commissioner replied to the aforesaid letter of August 16, 1930, and declined to initiate transferee proceedings against the distributees of said estate of Isidore Rosenberg, deceased, who are the plaintiffs herein.

XXV.

On January 28, 1931, defendant, as such Collector and acting under instructions of said Commissioner, caused a letter or notice to be addressed and delivered to each of the plaintiffs herein in identical language, except as to the name, the address of the party and the interest in the property, which said notice was in the [12] *the* words and figures following, viz.:

TREASURY DEPARTMENT,
Internal Revenue Service,
San Francisco, Calif.

January 28, 1931.

Office of the Collector,
First District of California.

In replying refer to
Field Division—P.B.S.

Mr. Edgar Rosenberg,
Chancellor Hotel,
433 Powell St.,
San Francisco, California.

Sir:—

By virtue of a warrant for distraint placed in my hands for service by the Collector of Internal Revenue for the First District of California, and which was issued for unpaid income taxes amounting to \$4,787.60 together with interest thereon which has been assessed against the Estate of Isidore Rosenberg, San Francisco, California, and of which you are one of the heirs, I have levied upon the following described property of which you have an undivided sixteen forty-eighths interest:—

Commencing at a point on the westerly line of Powell Street distant thereon ninety-one (91) feet three (3) inches northerly from the point formed by the intersection of the said westerly line of Powell Street with the northerly line of Post Street, running thence northerly along the said westerly line of Powell

Street forty-six (46) feet one (1) inch, thence at a right angle westerly eighty (80) feet, thence at a right angle southerly forty-six (46) feet one (1) inch and thence at a right angle easterly eighty (80) feet to the westerly line of Powell Street and the point of commencement. Being a portion of 50 Vara Lot Number 586.

Under the provisions of Section 3190, Revised Statutes of the United States, the above property will be duly advertised in the "Daily Commercial News" and sale of the above will be made on the steps of the CUSTOM HOUSE, Battery & Washington Sts. on February 26th, 1931, at 10 o'clock A. M.

Respectfully,

S:W.

P. S. HIGGINS,

Chief Field Deputy Collector. [13]

Each of the plaintiffs herein received a copy of the foregoing letter or notice on January 29, 1931. On said date no assessment of liability for any taxes alleged to be payable from said estate of Isidore Rosenberg, deceased, nor any notice or demand for payment thereof, had been made against plaintiffs or any of them by said Commissioner of Internal Revenue or by said defendant, as such Collector.

XXVI.

The parcel of real property described in the notice of levy and intention to sell hereinabove quoted is the same parcel of real property hereinabove in paragraph IX described.

XXVII.

On or about February 16, 1931, defendant, as such Collector, postponed the sale of plaintiff's interest in said property under distraint proceedings and thereafter set aside and vacated the notices served on plaintiffs and each of them as hereinbefore in paragraph XXV alleged. However, defendant informed plaintiffs' attorney that he would proceed to distrain for said alleged estate tax under instruction of the Commissioner.

XXVIII.

On May 21, 1931, plaintiffs addressed and mailed a letter and protest to defendant, as such Collector, wherein they called his attention to the facts of the case and the refusal of said Commissioner to proceed against them as transferees. Plaintiffs are informed and believe, and for that reason allege, that defendant transmitted a copy of said letter to said Commissioner and that on or about June 23, 1931, defendant received a letter from said Commissioner relating to plaintiff's aforesaid letter of May 21, 1931. On June 24, 1931, defendant, by letter informed plaintiffs that said Commissioner had ordered him "to proceed by distraint."

XXIX.

On June 25, 1931, plaintiffs addressed and mailed a [14] letter and protest to said Commissioner as follows:

June 25th, 1931.

Commissioner of Internal Revenue,
Constitution Ave., Between Tenth & Twelfth
Sts., N. W.
Washington, D. C.

In re: Estate of Isidore Rosenberg, Deceased.
A&C:Col:O.

Dear Sir:

My sister, Helen Rosenberg Kahn, my brother, Edgar D. Rosenberg, and I, distributees of the estate of Isidore Rosenberg, deceased, have been informed by the Collector of Internal Revenue that he has been ordered to proceed by distraint against property belonging to us to collect an alleged deficiency in tax asserted by you against said estate.

The three of us desire to protest this arbitrary and illegal order and again to call to your attention the fact that, in seeking to collect said alleged deficiency in tax, you are proceeding in violation of the Revenue Acts involved in two respects: (1) You are asserting a lien against the property distributed to us from said estate on the assumption that section 409 of the Revenue Act of 1921 creates such a lien and (2) You are refusing to proceed against us as transferees of said estate as required by section 316 of the Revenue Act of 1926.

Section 409 of the Revenue Act of 1921 is not authority for the assertion of a lien by you under the facts involved in this matter. Section 316 of the Revenue Act of 1926 provides the only method for you to proceed against us for the assessment

and collection of the alleged tax liability due from said estate.

Will you please advise me of your intended action in this matter.

Very truly yours,

(Signed) CLAUDE N. ROSENBERG,

For Himself and Helen Rosenberg Kahn and Edgar D. Rosenberg.

A copy of the foregoing letter and protest was on said date mailed to defendant.

XXX.

On July 6, 1931, said Commissioner addressed and mailed a letter to said Claude N. Rosenberg, one of the plaintiffs [15] herein, in reply to the letter hereinabove in paragraph XXIX set forth, as follows:

July 6, 1931.

A&C:Col:O.

Mr. Claude I. Rosenberg,
c/o Bacigalupi, Elkus & Salinger,
485 California Street,
San Francisco, California.

Sir:

Receipt is acknowledged of your communication dated June 25th regarding the collection of taxes assessed against the Estate of Isidore Rosenberg. You request to be advised as to what action the Bureau intends to take in connection with this matter.

In reply, you are informed that the Collector has been advised that the tax in question is collectible by process of distraint. It is suggested you

get in touch with the Collector of Internal Revenue at San Francisco with a view to satisfying the liability.

Respectfully,
 (Signed) GEO. J. SCHOENEMAR,
 Deputy Commissioner.

NrVa.

XXXI.

On August 17, 1931, defendant, as such Collector, caused a letter or notice to be addressed and delivered to each of said plaintiffs, which said letters and notices were in identical language, except as to the name, the address of the party and the interest in the property described, and were in the words and figures following, viz.:

TREASURY DEPARTMENT,
 Internal Revenue Service.

San Francisco, Calif.,
 August 17, 1931.

Office of the Collector,
 First District of California.

In replying refer to
 Field Division—P. S. R.
 Mr. Claude Rosenberg,
 c/o Sidney Kahn Co.
 Pacific Bldg.

San Francisco, California.

Sir:—

By virtue of a warrant for distraint [16] placed in my hands for service by the Collector of Internal Revenue for the First District of Cali-

fornia, and which was issued for unpaid estate taxed amounting to \$4,787.60 together with interest thereon which has been assessed against the Estate of Isidore Rosenberg, San Francisco, California, and of which you are one of the heirs, I have levied upon the following described property of which you have an undivided ten-forty-eighth interest:—

COMMENCING at a point on the westerly line of Powell Street distant thereon ninety-one (91) feet three (3) inches northerly from the point formed by the intersection of the said westerly line of Powell Street with the northerly line of Post Street, running thence northerly along the said westerly line of Powell Street forty-six (46) feet one (1) inch, thence at a right angle westerly eighty (80) feet, thence at a right angle southerly forty-six (46) feet one (1) inch and thence at a right angle easterly eighty (80) feet to the westerly line of Powell Street and the point of commencement. Being a portion of 50 Vara Lot Number 586.

Under the provisions of Section 3190, Revised Statutes of the United States, the above property will be duly advertised in the "daily Commercial News" and sale of the above will be made on the steps of the CUSTOM HOUSE, Battery & Washington Sts. on September 1, 1931, at 10 o'clock A. M.

Respectfully,

BURNETT SHEEHAN,

Deputy Collector.

S:W.

The defendant served no notice of any nature whatsoever on said administrator of the estate of Isidore Rosenberg, deceased, at said time or at any time subsequent to May 12, 1930, as alleged in paragraph XXII hereinabove, relating to said distraint proceedings or to the collection of any tax. The property described in said notice is the same as that hereinabove described in paragraph IX and XXV. [17]

XXXII.

Defendant, as such Collector of Internal Revenue, has threatened to, now threatens to, and will, unless restrained by order of this court, levy upon, seize and sell the interests of plaintiffs and each of them in the real property hereinabove described on September 1, 1931, under the alleged warrant of distraint hereinabove in paragraph XXI mentioned for the purpose of enforcing the collection of the amount of \$4,787.60 alleged estate tax together with interest asserted to be due thereon in excess of \$2,513.47, which said defendant asserts to be due from said estate of Isidore Rosenberg, deceased.

XXXIII.

That the amount of \$4,787.60, which defendant asserts to be a deficiency in estate tax, is the amount of an alleged erroneous refund. That the interest sought to be collected by defendant as aforesaid, computed on the basis used by defendant as being in excess of \$2,513.47, is erroneously and illegally claimed, in that no statutory or other legal provision permits charging or collecting interest on

erroneous refunds from the date the estate tax became due or from any other date.

XXXIV.

The asserted tax which defendant seeks to collect by distraint is \$4,787.60 and the asserted amount of interest thereon is not less than \$2,513.48, or a total of not less than \$7,301.08, and, if paid by plaintiffs to prevent the sale of said property, will be lost to them, their right thereto utterly destroyed for want of remedy at law, and plaintiffs will suffer irreparable damage in that amount.

XXXV.

Because the property proposed to be sold is held in undivided interests and is maintained and operated under partnership [18] agreement as hereinbefore in paragraph XV alleged, and, also, due to present conditions in values, particularly in real estate values, said property could be sold only at great sacrifice or at an extraordinarily low price and plaintiffs would suffer irreparable injury and damage. The proposed sale of said property under distraint proceedings would terminate and cause the liquidation of said partnership and cause damage to plaintiffs far in excess of the amount of said alleged deficiency in tax, with interest, and beyond any amount which might be recovered in any action for damages against defendant by plaintiffs or the United States after said sale was made, if any such right of action would exist.

XXXVI.

The position of the Commissioner of Internal

Revenue and the defendant as above alleged and the threatened action of defendant as hereinbefore stated are violative of plaintiffs' rights under the Fifth Amendment to the Constitution of the United States in that defendant, acting under the direction of said Commissioner, seeks to deprive plaintiffs of their property without due process of law.

XXXVII.

By reason of the facts hereinabove alleged, plaintiffs have and each of them has, no speedy, plain, adequate, or complete remedy at law, or any remedy at law, and plaintiffs are, and each of them is, deprived of all equitable and legal defenses and rights as transferees, if such they be, and will suffer immediate and irreparable injury, loss and damage in event that collection and payment of said amount of \$4,787.60, or any part thereof, together with interest thereon is enforced by the sale under distraint proceedings threatened and hereinabove complained of.

XXXVIII.

The facts and circumstances involved in this proceeding are exceptional and extraordinary, and are such as to entitle plaintiffs [19] to relief in equity, in the following and each of the following particulars, viz.:

1. The alleged lien under which defendant, as such Collector, seeks to proceed is illegal and void, and without warrant in law;

2. The warrant of distraint heretofore in paragraph XXI alleged was issued without warrant of

law and in violation of the Fifth Amendment of the United States Constitution, and is illegal and void as to plaintiffs herein and each of them;

3. Defendant and said Commissioner are without power to assess a deficiency against plaintiffs, or proceed by distraint proceedings to collect from plaintiffs, and alleged liability for taxes of said estate of Isidore Rosenberg, deceased, by the provisions of sections 316 and 308 (a) of the Revenue Act of 1926;

4. Plaintiffs herein as distributees of the estate of Isidore Rosenberg, deceased, are without remedy at law either to prevent defendant, as such Collector, from selling under said distraint warrant their respective interests in and to the above described real property or to obtain refund of the amount of said alleged tax and interest, if paid by them, in that, if they paid said alleged tax and interest, they are expressly prohibited by statute from making any claim for refund of any amount paid by them in satisfaction of said alleged tax or bringing action in any court for any part of such tax or interest which they might pay;

5. Said Commissioner has failed and refused to proceed to assess against or collect from plaintiffs or any of them their liability, if any, as the distributees of said estate "in the same manner and subject to the same provisions and limitations as in the case of a deficiency" in estate tax and has thereby deprived plaintiffs, and each of them, of the right to defend against any liability which might be asserted against them, or any of them,

as transferees or to pay any alleged liability as transferees and seek to recover the same [20] on claim or in action for refund thereof;

6. Said Commissioner has refused to assert or determine a liability at law or in equity, or proceed against plaintiffs, or any of them, as transferees of said estate of Isidore Rosenberg, deceased, for any alleged estate tax against said estate as required of him by law;

7. Said Commissioner has failed and neglected to bring any action at law or in equity to attempt to recover from said plaintiffs or any of them the estate tax alleged to be due from said estate and thus permit them to defend against any liability for said alleged tax;

8. The only remedies at law which remained available to plaintiffs, or any of them, after defendant, as such Collector, issued his warrant of distraint as aforesaid was that of protest to said defendant and Commissioner against procedure under said warrant of distraint and make demand on said Commissioner to proceed against plaintiffs as transferees of the said estate of Isidore Rosenberg, deceased. Plaintiffs made such protest and demand as aforesaid and were denied any relief by said Commissioner, or by defendant; that plaintiffs and each of them have thus exhausted the only remedies now open to or afforded them by law;

9. Only said Commissioner may initiate steps to create said plaintiffs transferees, or confer upon them the right to defend themselves as transferees, whereupon and whereunder plaintiffs, or any of

them, may avail themselves of a defense against said asserted tax liability, or a transferee liability, or a right of claim for refund or action therefor, and this said Commissioner has failed and refused to do;

10. Irreparable and irrecoverable damages will result to plaintiffs and each of them if defendant, as such Collector, is permitted to proceed with distraint proceedings now threatened and hereinabove alleged;

11. Defendant, as such Collector, is seeking by warrant of distraint to seize and sell property of persons other than the taxpayer on [21] which the Federal Government has no present legal lien or claim of lien and under circumstances which, if plaintiffs pay the alleged tax they will have no remedy at law under the Federal statutes to sue and recover the money paid;

12. Plaintiffs herein are not taxpayers against whom the alleged tax was so assessed and levied, nor have they been recognized by said Commissioner or defendant as transferees within the meaning of that word as used in the Revenue Act of 1926, nor have they any status under said Revenue Act or the Revenue Act of 1928 which subjects them to liability for tax, lien, or distraint;

13. Said amount of \$4,787.60 sought to be collected by distraint proceeding as hereinabove alleged is the amount of an alleged erroneous refund and, as such, there is not and cannot be any lien therefor against the property of the said estate of Isidore Rosenberg, deceased, or against the prop-

erty of plaintiffs, or any of them, and there is no provision of law for the attachment of a lien against said property or proceeding by distraint for the recovery of any erroneous refund or for any other remedy than one of action at law to recover such erroneous refund.

WHEREFORE, plaintiffs pray, and each of them prays, that defendant, as such Collector of Internal Revenue, his successors in such office, his attorneys, deputies and agents may be enjoined and restrained temporarily, until the final hearing, and perpetually thereafter from issuing and levying distraint warrants against the plaintiffs herein, or any of them, and their property, or the property of any of them, and from advertising or offering for sale the above-described property, and from enforcing the collection of said amount of \$4,787.60, or any part thereof or interest thereon by distraint or otherwise, and from selling or attempting to sell the property of plaintiffs, or any of them, or any part thereof, [22] and from all trespass on said property, and plaintiffs and each of them, pray for such other and further relief as may be proper in the premises.

ADOLPHUS E. GRAUPNER.

ADOLPHUS E. GRAUPNER,

1120 Balfour Building,

San Francisco, California,

Attorney for Plaintiffs. [23]

City and County of San Francisco,
State of California,—ss.

Claude N. Rosenberg, being first and duly sworn, deposes and says: I am one of the plaintiffs above named and have read the foregoing bill of complaint and know the contents thereof, and the same is true of my knowledge, except as to those matters therein stated on information and belief, and as to those matters I believe it to be true.

CLAUDE N. ROSENBERG.

Subscribed and sworn to before me this 25th day of August, 1931.

[Seal] RAY SOPHIE FEDER,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed Aug. 25, 1931. [24]

[Title of Court and Cause.]

ACKNOWLEDGMENT OF SERVICE OF OR-
DER TO SHOW CAUSE.

Service and receipt of a copy of the attached original order to show cause together with a copy of the bill in equity for injunction in the above-entitled proceeding is hereby admitted this 25th day of August, 1931.

JOHN P. McLAUGHLIN,
Defendant,
Collector of Internal Revenue of the United States
for the First District of the State of Cali-
fornia. [25]

[Title of Court and Cause.]

ORDER TO SHOW CAUSE.

Upon reading and filing the verified complaint of plaintiffs in the above-entitled action, and good cause appearing therefor,—

IT IS ORDERED, ADJUDGED AND DECREED that the defendant above named show cause, if any he have, on the 31st day of August, 1931, at the hour of 10:00 o'clock A. M., before the above-entitled court at its courtroom in the Post Office Building, 7th and Mission Streets, in the City and County of San Francisco, State of California, why a temporary injunction should not issue, pending the trial of the above-entitled action and until final judgment therein, restraining the said defendant, his attorneys, agents and deputies from in any manner enforcing or attempting to enforce the collection of the sum of \$4,787.60 as and for additional estate taxes for the estate of Isidore Rosenberg, deceased, or any part of said sum, or any interest thereon, or from collecting said sum of \$4,787.60, or any part thereof or any interest thereon, by distraint or otherwise, and from in any manner levying upon or seizing or selling, or attempting to seize or sell any property or interests of plaintiffs, or any of them, under a certain warrant of distraint issued by defendant on or about May 12, 1930, or otherwise.

Dated, this 25th day of August, 1931.

A. F. ST. SURE,
District Judge.

[Endorsed]: Filed Aug. 26, 1931. [26]

[Title of Court and Cause.]

MOTION TO DISMISS COMPLAINT.

Now comes the defendant herein and moves the court for an order dismissing the complaint for want of equity and for such other and further relief as defendant in law and in equity may be entitled to receive.

GEO. J. HATFIELD,
United States Attorney,
By ESTHER B. PHILLIPS,
Assistant United States Attorney,
Attorneys for Defendant.

Service of the within motion by copy admitted this 29th day of August, 1931.

A. E. GRAUPNER,
Attorney for Plaintiffs.

[Endorsed]: Filed Aug. 29, 1931. [27]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Monday, the 12th day of October, in

the year of our Lord one thousand nine hundred and thirty-one. Present: The Honorable A. F. ST. SURE, District Judge.

[Title of Court and Cause.]

MINUTES OF COURT—OCTOBER 12, 1931—
ORDER SUBMITTING APPLICATION
FOR INJUNCTION PENDENTE LITE.

By consent, IT IS ORDERED that the application for an injunction pendente lite be submitted upon the filing of briefs in 20, 20 and 10 days.
[28]

[Title of Court and Cause.]

ORDER GRANTING MOTION TO DISMISS
COMPLAINT.

ORDERED that defendant's motion to dismiss plaintiffs' complaint be and the same is hereby GRANTED.

Dated: May 25, 1932.

A. F. ST. SURE,
United States District Judge.

[Endorsed]: Filed May 26, 1932. [29]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Thursday, the 26th day of May, in the year of our Lord one thousand nine hundred and thirty-two. Present: The Honorable A. F. ST. SURE, District Judge.

[Title of Court and Cause.]

MINUTES OF COURT—MAY 26, 1932—ORDER
GRANTING MOTION TO DISMISS COM-
PLAINT.

Pursuant to a signed order this day filed, IT IS ORDERED that defendant's motion to dismiss plaintiff's complaint be and the same is hereby GRANTED. [30]

[Title of Court and Cause.]

NOTICE OF ORDER GRANTING DEFEND-
ANT'S MOTION TO DISMISS.

To Plaintiffs Above Named and to A. E. Graupner,
Esq., Their Attorney:

You, and each of you, will please take notice that order of the court was entered on the 26th day

of May, 1932, granting the defendant's motion to dismiss the complaint in this case.

GEO. J. HATFIELD.

GEO. J. HATFIELD,

United States Attorney.

ESTHER B. PHILLIPS.

ESTHER B. PHILLIPS,

Asst. United States Attorney.

Service of the within notice by copy admitted this 27th day of May, 1932.

A. E. GRAUPNER,

Attorney for Plff.

[Endorsed]: Filed May 28, 1932. [31]

In the Southern Division of the United States District Court for the Northern District of California.

IN EQUITY—No. 2998—S.

EDGAR D. ROSENBERG et al.,

Plaintiffs,

vs.

JOHN P. McLAUGHLIN, Collector of Internal Revenue, etc.,

Defendant.

DECREE.

The plaintiffs' order to show cause, if any, why a temporary injunction should not issue restraining the defendant from enforcing the collection of additional estate taxes, and the defendant's motion

to dismiss the complaint for want of equity having regularly come on for hearing, and the motions having been argued and submitted, and the court having duly considered the same, and on the 26th day of May, 1932, the court having entered an order that the defendant's motion to dismiss plaintiffs' complaint be granted, now, therefore,

IT IS ORDERED, ADJUDGED AND DECREED that the plaintiffs' motion for a temporary injunction be and the same is hereby denied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the complaint be and it is hereby dismissed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendant have his costs herein incurred.

Dated: June 8, 1932.

A. F. ST. SURE,
United States District Judge.

[Endorsed]: Filed and Entered Jun. 8, 1932.
[32]

[Title of Court and Cause.]

NOTICE OF ENTRY OF JUDGMENT.

To Plaintiffs Above Named and to A. E. Graupner,
Their Attorney:

Please take notice that final decree dismissing the complaint herein was entered on June 8, 1932.

Dated June 8, 1932.

GEO. J. HATFIELD,
United States Attorney,
ESTHER B. PHILLIPS,
Assistant United States Attorney.

Service of the within notice by copy admitted
this 8 day of June, 1932.

A. E. GRAUPNER,
Attorney for _____.

[Endorsed]: Filed Jun. 8, 1932. [33]

[Title of Court and Cause.]

PETITION FOR APPEAL AND ORDER AL-
LOWING SAME.

To the Honorable A. F. ST. SURE, District Judge:

The above-named plaintiffs, Edgar D. Rosenberg, Helen Rosenberg Kahn and Claude N. Rosenberg, as individuals, by and through Adolphus E. Graupner, their attorney, feeling aggrieved by the judgment returned and entered in the above-entitled suit on the 8th day of June, 1932, do hereby appeal from said judgment to the Circuit Court of Appeals for the Ninth Circuit, for the reasons set forth in the assignment of errors filed herewith, and they severally pray that this appeal be allowed and that a transfer of the record of proceedings upon which said judgment was based and made, duly authenticated, be sent to the United States Court of Appeals for the Ninth Circuit, under the

rules of such court in such cases made and provided and your petitioners further pray that the proper order relating to the security to be required of them be made.

ADOLPHUS E. GRAUPNER,
ADOLPHUS E. GRAUPNER,
1120 Balfour Building,
Attorney for Plaintiffs. [34]

Appeal allowed upon giving bond for costs on appeal in the amount of \$250.00.

Dated June 10, 1932.

A. F. ST. SURE,
District Judge.

Due service and receipt of a copy of the within petition for appeal and order allowing same is hereby admitted this 10th day of June, 1932.

GEO. J. HATFIELD,
U. S. Attorney,
Attorney for Defendant.
By ESTHER B. PHILLIPS,
Asst. U. S. Attorney.

[Endorsed]: Filed Jun. 10, 1932. [35]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Now come the plaintiffs above named, as individuals, and file the following assignment of errors upon which they will rely, severally and jointly, in the prosecution of their appeal in the above-

entitled suit from judgment made by this Honorable Court on the 8th day of June, 1932:

The court erred in making and entering its judgment against the plaintiffs herein and in favor of the defendant herein upon each and all of the following grounds:

1. That plaintiffs' bill in equity for injunction fully stated adequate and sufficient grounds for equitable relief.

2. That the statement of facts and rights to equitable relief in plaintiffs' bill in equity for injunction were sufficient to require the court to issue order of restraint, or injunction *pendente lite*; and grant unto plaintiffs equitable relief.

3. That the judgment is not in accord with the admitted facts of the bill of injunction.

4. That the judgment is contrary to the laws involved and the applicable rules of equitable relief. [36]

5. That defendant's admission of the facts pleaded in plaintiffs' bill of injunction deprived defendant of any right to judgment.

6. That the court, in entering its judgment, ignored and violated the following applicable sections of the various Revenue Acts and Federal Statutes necessarily involved, and their interpretation by the United States Supreme Court, viz.: Revenue Act of 1921, Sections 406, 407 and 408. Revenue Act of 1926, Sections 316, 308 and 319(a). Revised Statutes, Section 3186(a), 26 U. S. C. A., sec. 115(a).

7. That the court treated the amount sought

to be collected by distraint by defendant as a tax when, as a matter of fact, all taxes had been paid before any assessment for taxes had been made by the Commissioner or notice and demand for payment had been made on the administrator of the estate of Isidore Rosenberg, deceased, by defendant.

8. That the attempt of defendant to collect money from plaintiffs or any of them by distraint proceedings under the admitted facts was without authority or warranty of law and violative of revenue acts or statutes.

9. That no determination of any liability of the plaintiffs for any tax has ever been adjudged or found and defendant is without power to collect by distraint or otherwise any alleged tax from plaintiffs.

10. That the money which defendant seeks to recover by distraint and without court proceedings brought by the United States, is, if anything, an erroneous refund.

11. That plaintiffs are by statutory prohibition (Revenue Act 1926, Section 319(a)), deprived of any remedy at law to recover the amount claimed by defendant and are therefore entitled to equitable relief. [37]

12. That the circumstances disclosed by the bill of complaint herein are so extraordinary, exceptional and irremediable (as well as illegal) that Section 3224, U. S. Revised Statutes (26 U. S. C. A., Section 154) may not apply to deprive plaintiffs of equitable relief.

Court may upon not less than ten days notice to the surety above named proceed summarily to ascertain the amount which said surety is bound to pay on account of such breach and render judgment therefor against said surety and award execution therefor.

Dated this 8th day of June, 1932.

UNION INDEMNITY COMPANY. [Seal]

By JOHN D. HAVERKAMP,

Attorney-in-fact.

State of California,

City and County of San Francisco,—ss.

On this 8th day of June, 1932, before me appeared John D. Haverkamp, to me personally known, who being by me duly sworn, did say he is the agent and attorney-in-fact of the Union Indemnity Company of New Orleans, La.; that the seal affixed to the foregoing instrument is the corporate seal of the said corporation, and that the said instrument was signed and sealed on behalf of said corporation by authority of its Board of Directors, and the said John D. Haverkamp acknowledged that he executed said instrument as such agent and attorney-in-fact and as the free act and deed of said corporation.

[Seal]

CON T. SHEA,

Notary Public San Francisco City and County.

My commission expires 7/30/35.

Approved.

A. F. ST. SURE,

U. S. District Judge.

[Endorsed]: Filed Jun. 11, 1932. [40]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

You are hereby requested and directed to prepare and certify a transcript of the record in the above-entitled suit for the use of the Circuit Court of Appeals of the United States for the Ninth Circuit, by including therein the following papers:

1. Bill of complaint in equity for injunction.
2. Order to show cause.
3. Motion to dismiss.
4. Minute-book entry, dated October 12, 1931, ordering order to show cause and motion to dismiss to be submitted on briefs.
5. Minute-book entry of order of dismissal of bill of complaint, dated May 26, 1932.
6. Notice of order granting defendant's motion to dismiss.
7. Decree.
8. Notice of entry of decree.
9. Petition and order for appeal.
10. Bond on appeal.
11. Assignment of errors. [41]
12. Citation to the appellee.
13. Praecipe for transcript of record.

Dated: June 11th, 1932.

ADOLPHUS E. GRAUPNER.

ADOLPHUS E. GRAUPNER,

Attorney for Plaintiffs and Appellants,

1120 Balfour Building.

Receipt of a copy of the within praecipe is hereby admitted this 11th day of June, 1932.

GEO. J. HATFIELD,
Attorney for Defendant and Respondent.

[Endorsed]: Filed Jun. 11, 1932. [42]

District Court of the United States, Northern District of California.

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 42 pages, numbered from 1 to 42, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of Edgar D. Rosenberg et al. vs. John P. McLaughlin, etc., No. 2998-S., as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$8.30, and that the said amount has been paid to be by the attorney for the appellants herein.

In witness whereof, I have hereunto set my hand and affixed the seal of said District Court, this 16th day of June, A. D. 1932.

[Seal]

WALTER B. MALING,
Clerk.

B. E. O'Hara,
Deputy Clerk. [43]

[Title of Court and Cause.]

CITATION ON APPEAL.

United States of America,
Northern District of California,—ss.

To John P. McLaughlin, Collector of Internal Revenue and to the United States Attorney for the Northern District of California, GREETING:

You are hereby cited and admonished to be and appear at the Circuit Court of Appeals at the City and County of San Francisco, State of California, on the 8th day of July, 1932, pursuant to an order allowing an appeal filed and entered in the Clerk's office for the District Court of the United States for the Northern District of California, from the final judgment or decree signed, filed and entered on the 8th day of June, 1932, in that certain suit being numbered 2998-S. in the files and records of said court, wherein Edgar D. Rosenberg, Helen Rosenberg Kahn and Claude N. Rosenberg are plaintiffs and appellants, to show cause, if any there be, why the judgment or decree rendered against said appellants, as in said order allowing appeal mentioned, should not be corrected, and why justice should not be done to the parties in that behalf.

WITNESS, the Honorable A. F. ST. SURE, Judge of the United States District Court for the Northern District of California, this 11th day of June, 1932.

A. F. ST. SURE,
Judge.

Receipt of a copy of within citation on appeal is hereby admitted this 11th day of June, 1932.

GEO. J. HATFIELD,

Attorney for Defendant and Respondent.

Filed Jun. 11, 1932.

[Endorsed]: No. 6872. United States Circuit Court of Appeals for the Ninth Circuit. Edgar D. Rosenberg, Helen Rosenberg Kahn and Claude N. Rosenberg, Appellants, vs. John P. McLaughlin, Collector of Internal Revenue for the First District of California, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed June 17, 1932.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.